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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 CHRISTINE CHANG, individually and as)
Guardian Ad Litem for ERIC SUN, disabled,)

11 Plaintiff,)

12 vs.)

13 ROCKRIDGE MANOR CONDOMINIUM,)
14 et al.,)

15 Defendants.)

Case No.: C 07 4005 EMC

**CLOSING POINTS & AUTHORITIES
IN SUPPORT OF MOTION TO
DISMISS FIRST AMENDED
COMPLAINT FOR LACK OF
SUBJECT MATTER JURISDICTION
AND/OR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF CAN
BE GRANTED AND FOR A MORE
DEFINITE STATEMENT (FRCP
12(b)(1), 12(b)(6) AND 12(e))**

Date: n/a

Time: n/a

Dept: Magistrate Judge Edward M. Chen

19 Complaint Filed: August 3, 2007

20 Defendant Pamela Zimba submits the following closing points and authorities in support of
21 her motion to dismiss the causes of action for "Abuse of Process" and "Fraud and
22 Misrepresentation" asserted against her by plaintiffs Christine Chang and Eric Sun¹ in their First
23 Amended Complaint ("FAC") in the instant action, or for a more definite statement of the said
24 causes of action, and each of them.

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28 ¹ Ms. Zimba reminds the Court of its recent order dismissing Mr. Sun as a plaintiff and, in turn, dismissing all claims asserted by Mr. Sun.

LEGAL ISSUES AND ARGUMENTS

1. **PLAINTIFF HAS FAILED TO RESPOND TO MS. ZIMBA'S MOTION TO DISMISS HER CAUSE OF ACTION FOR "ABUSE OF PROCESS;" THAT CAUSE OF ACTION MUST BE DISMISSED**

Ms. Zimba's moving papers made three separate and distinct arguments for dismissal of the "Abuse of Process" cause of action asserted in ¶52 of the FAC. The first argument noted that the Court had already declared that plaintiffs' abuse of a process claim was time-barred; i.e., that as per the February 13, 2008 Order Granting Defendants' Motion to Dismiss, Etc., "The nonfraud claims are barred by the statute of limitations and dismissed with prejudice." Order, 24-9-10. The second argument showed that plaintiffs had failed to satisfy the elements of the state law tort of abuse of process, in that they had not alleged that Ms. Zimba had initiated or used any sort of court process against Ms. Chang or Mr. Sun. In her third argument, Ms. Zimba showed that (as per the February 2008 Order) the two-year statute of limitations set out in California CCP §335.1 effectively barred plaintiffs' claims for abuse of process by the time Ms. Chang first filed the instant action.

Ms. Chang has now filed her Plaintiffs' Opposition to Defendant Pamela Zimba's Memorandum of Points and Authorities re Motion to Dismiss, Etc. and Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendant Pamela Zimba [sic] Motion to Dismiss First Amended Complaint, Etc. On review of those papers, it appears that neither makes any response to any of Ms. Zimba's arguments with respect to the abuse of process claim. The Court might, for instance, note that none of the three cases cited at pages 2-3 of plaintiffs' Memorandum of Points and Authorities involves or refers to any claim for abuse of process. In a similar vein, plaintiffs' papers entirely ignore CCP §335.1 and the Court's February 2008 Order.

Ms. Zimba's moving papers provide compelling support for her motion to dismiss plaintiffs' claim for abuse of process with prejudice. In the absence of any opposing argument from Ms. Chang, Ms. Zimba respectfully urges the Court to grant her request and enter an order dismissing Ms. Chang's abuse of process with prejudice.

2. **THE COURT SHOULD DISMISS PLAINTIFF'S FRAUD CLAIM WITH PREJUDICE**

As noted in Ms. Zimba's moving papers, the Court's February 13, 2008 Order directed

1 that, "Plaintiffs shall provide a more definite statement as to the basis of their claim for fraud,"
2 going on to hold that plaintiffs "...must specify such facts as the times, dates, and places of the
3 fraud, the benefits received by Ms. Zimba, and other details of the alleged fraudulent activity." Put
4 simply, the FAC does not meet that standard. Ms. Chang's opposition papers respond to Ms.
5 Zimba's argument by stating – or perhaps more accurately, re-restating – her lengthy, implausible
6 and often bizarre litany of Ms. Zimba's purported misdeeds. However, the opposition papers
7 make no meaningful reference to the First Amended Complaint; they do not, for instance, argue
8 that that pleading meets the "particularity" standard set forth in FRCP 9(b) or refer to any
9 allegation within the FAC that would satisfy the February 2008 Order.

10 Ms. Chang's Memorandum of Points and Authorities cites three cases, including *American*
11 *Airlines, Inc. v. Sheppard* (2002) 96 Cal.App.4th 1017, *Bankers Trust Co. v. Pacific Employers Ins.*
12 *Co.* (1960) 282 F.2d 106 and *Hamilton v. Prudential Financial* (ED Cal. 2007) 2007 U.S. Dist.
13 LEXIS 72034. Unfortunately, Ms. Chang has failed to explain how those cases or their holdings
14 are relevant to any issue raised by Ms. Zimba's motion to dismiss. While Ms. Chang apparently
15 cites *American Airlines* for the proposition that Ms. Zimba was her fiduciary, Ms. Zimba has never
16 contested that point or based any argument on a contention that she had not been Ms. Chang's
17 fiduciary. The *Bankers Trust* case stands for the proposition that a party to a contract may sue for
18 both breach of contract and, in a separate action, for fraud in the inducement to enter into the same
19 contract; again, no such issue is involved in the instant action. Finally, while *Hamilton* discusses
20 the elements of a California state law claim for intentional infliction of emotional distress, the
21 Court's February 13, 2008 ruling that, "The nonfraud claims are barred by the statute of limitations
22 and dismissed with prejudice" means that Ms. Chang is barred from any further attempts to assert
23 or pursue such a claim against Ms. Zimba or any other defendant.

24 Ms. Chang has had two chances to plead her fraud claim against Ms. Zimba in a manner
25 consistent with Rule 9(b). Like its failed predecessor, her First Amended Complaint misses that
26 mark by a wide margin. Ms. Zimba thus respectfully urges the Court to grant this motion to
27 dismiss plaintiff's cause of action for "Fraud and Misrepresentation" with prejudice.
28

1 **3. 28 U.S.C. §1367(a) COMPELS THE COURT TO DISMISS ANY SURVIVING**
 2 **STATE LAW CLAIMS AGAINST MS. ZIMBA**

3 As noted in Ms. Zimba's initial moving papers, plaintiff's causes of action against her for
 4 abuse of process and fraud both arise under state law; accordingly, both claims fall outside of the
 5 Court's original jurisdiction. The Court must thus look to 28 U.S.C. §1367(a) to determine if it has
 6 supplemental jurisdiction over either of those claims. Ms. Zimba's moving papers show that the
 7 existing state law claims against her do not "form part of the same case or controversy" as the
 8 remaining §1983 claims against the Regents Individual Defendants that represent the plaintiffs'
 9 only surviving federal claims, and that §1367(a) thus requires the Court to dismiss any surviving
 10 claims against her for lack of jurisdiction. Plaintiff's opposition papers make no reference or
 11 response to that argument, leaving the Court with little choice but to grant Ms. Zimba's motion to
 12 dismiss for lack of jurisdiction.

13 **4. ANY SURVIVING STATE LAW CLAIM(S) AGAINST MS. ZIMBA SHOULD BE**
 14 **DISMISSED PURSUANT TO 28 U.S.C. §1367(c), AS IT/THEY SUBSTANTIALLY**
PREDOMINATE OVER PLAINTIFFS' FEDERAL CLAIMS

15 Ms. Zimba's moving papers also argue that, as per 28 U.S.C. §1367(c), the Court should
 16 decline to exercise §1367(a) supplemental jurisdiction over any surviving state law claims asserted
 17 against her. Ms. Chang has entirely failed to respond to that argument. In the unlikely event that
 18 either of Ms. Chang's claims is found sufficient to state a cause of action against her, Ms. Zimba
 19 thus respectfully urges the Court to decline to exercise supplemental jurisdiction over the surviving
 20 claim(s) pursuant to §1367(c).


21 **5. IF THE COURT DISMISSES PLAINTIFFS' TWO REMAINING FEDERAL**
 22 **CLAIMS, ANY SURVIVING STATE LAW CLAIM AGAINST MS. ZIMBA**
SHOULD BE DISMISSED PURSUANT TO 28 U.S.C. §1367(c)(3)

23 As noted in Ms. Zimba's moving papers, 28 U.S.C. §1367(c)(3) allows a district court to
 24 decline supplemental jurisdiction over a state law claim if it has "...dismissed all claims over
 25 which it has original jurisdiction." The Regents Individual Defendants have already moved to
 26 dismiss the §1983 claims that are Ms. Chang's sole remaining federal claims. Ms. Zimba has thus
 27 argued that if those claims are dismissed, the Court should decline to exercise supplemental
 28 jurisdiction over the state law claims against her and, in turn, should dismiss those claims.

1 A review of Ms. Chang's opposition papers shows that she has not responded to Ms.
2 Zimba's §1367(c)(3) argument. With no apparent opposition to that argument, Ms. Zimba urges
3 the Court to grant dismissal of any surviving state law claims against her pursuant to §1367(c)(3).

4 DATED: May 27, 2008

5 BOORNAZIAN, JENSEN & GARTHE
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7
8 By: 
9 ANDREW R. ADLER, ESQ.
10 Attorneys for Defendant
11 Pamela Zimba, Esq.
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PROOF OF SERVICE BY MAIL
(C.C.P. SECTIONS 1013(a) -2015.5)

I am employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within action. My business address is 555 12th Street, Suite 1800, P. O. Box 12925, Oakland, California 94604-2925.

I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. On the date indicated below, at the above-referenced business location, I sealed envelopes, enclosing a copy of the **CLOSING POINTS & AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND/OR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND FOR A MORE DEFINITE STATEMENT**, addressed as shown below, and placed them for collection and mailing following ordinary business practices to be deposited with the United States Postal Service on the date indicated below:

Ms. Christine Chang
341 Tideway Drive, #214
Alameda, CA 94501
Tel: 510-769-8232

Plaintiff In Pro Per

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California, on May 27, 2008.



LESLIE HASSBERG

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